89-815

Supreme Court, U.S.
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in the

Supreme Court

of the

United States

OCTOBER TERM, 1989

SHEREE K. CHALINE
Petitioner

VERSUS

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit erred in failing to follow the plain wording of the Federal Tort Claims Act in its application of the statutory employer immunity doctrine.

2. Whether the Court of Appeals for the Fifth Circuit erred in failing to follow the well-founded rulings of the United States Supreme Court in the application of the statutory employer immunity doctrine under the Federal Tort Claims Act.

LIST OF PARTIES

In accordance with Supreme Court Rule 21.1(b), Petitioner submits the following list of all parties to the proceeding in the United States Court of Appeals for the Fifth Circuit, whose judgment is sought to be reviewed. The parties are, to-wit:

A. List of Petitioner

1. Sheree K. Chaline

B. List of All Other Parties

2. The United States of America

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NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, SHEREE K. CHALINE, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on 18 August 1989, as well as the denial of rehearing en banc by the United States Court of Appeals for the Fifth Circuit entered on 20 September 1989.

OPINIONS BELOW

The original panel opinion of the United States Court of Appeals for the Fifth Circuit is reported at ___ F.2d ___. (Appendix A). Petitioner's Suggestion for Rehearing En Banc was denied on 20 September 1989. (Appendix B). The opinion of the District Court for

the Western District of Louisiana is not reported. (Appendix C).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on 18 August 1989. A Suggestion for Rehearing En Banc was denied on 20 September 1989. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. §2674 states, in relevant part, as follows:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

2. 28 U.S.C. §1346(b) states, in relevant

part, as follows:

> "Subject to the provisions of chapter 171 of this title...the district courts...shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occured."

STATEMENT OF THE CASE

Petitioner, SHEREE K. CHALINE, [hereinafter referred to as "CHALINE"] was injured on 19 June 1986 when a bumper mounted on a swinging door at the U.S. Post Office in Deridder, Louisiana severed her left achilles tendon. At that time she was delivering mail under a station-to-station contract with the U.S. Postal Service. The U.S. Postal Service had never performed this same work with its own employees, but rather had always hired

independent contractors such as "CHALINE" to perform the work.

In fact, at the time of the injury, "CHALINE's" contract was but one of 13,000 such independent contracts let by the Postal Service. The U.S. Postal Service reserved the right in the collective bargaining agreement with its unions to let these independent contracts. The U.S. Postal Service does not have the necessary manpower or equipment to perform this contract work, in addition to its regular mail responsibilities, and has no intention of ever performing the work itself.

"CHALINE's" administrative claim against The United States of America was denied, and she filed suit on 14 December 1987 against the United States of America pursuant to the Federal Tort Claims Act, 28 U.S.C. §2671 et seq. and 28 U.S.C. §1346(b). The matter then proceeded to trial before the Honorable

United States District Judge Donald E. Walter on 23 January 1989.

Since The United States of America had asserted the affirmative defense that it was the plaintiff's "statutory employer" pursuant to La.R.S. 23:1032 and 1061, that issue was tried first. At the conclusion of the trial of that issue, the District Judge dismissed plaintiff's claims and assigned oral reasons. (Appendix C). He stated, however, that his decision was based upon a distinction drawn by the Fifth Circuit between individual and governmental immunity under the statutory employer doctrine. He specifically noted that were he to follow the ruling of the Louisiana Supreme Court, the decision would have been different. See, Appendix C at pp. C17--C-18.

On 18 August 1989, a panel of the Fifth Circuit affirmed the District Court's ruling without mention of the multitude of United States Supreme Court decisions on point, and

a Suggestion for Rehearing En Banc was denied.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit has decided a federal question in a manner which conflicts with an unquestioned line of decisions of this Court. Supreme Court Rule 17.1(c).

I. WHETHER THE PANEL'S APPLICATION OF THE FEDERAL TORT CLAIMS ACT, 28 U.S.C. §1346(b) AND 28 U.S.C. §2071, ET SEQ., RELATIVE TO THE LOUISIANA LAW OF STATUTORY EMPLOYMENT VIOLATES THE CLEAR MANDATE OF THE UNITED STATES SUPREME COURT AND THE UNITED STATES CONGRESS.

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

28 U.S.C. §2674 (emphasis added).

The Federal Tort Claims Act clearly states that the United States must be treated as a private person; this Honorable Court has repeatedly so held; the panel of the Fifth Circuit has refused to follow either the statutory language or the decisions of this Court. The panel decision should be reversed.

For nearly thirty-five (35) years, this Court's decisions concerning liability of the United States under the Federal Tort Claims Act have unswervingly expressed the express legislative intent found in the plain wording of the Act. That is, the government must be treated the same as a private individual would be under like circumstances.

The Louisiana Supreme Court in Berry v. Holston Well Service, Inc., 488 So.2d 934 (La. 1986), set forth the analysis required in determining statutory employer immunity. The Fifth Circuit panel, however, ruled that based upon a decision of the Louisiana

Supreme Court which pre-dated its Berry decision, that a different test of automatic immunity should apply to the federal government as if it were a political subdivision. This result is contrary to both the decisions of this Court and the express intent of Congress.

The error in the Circuit court's opinion lies in the fact that it overlooked the pivotal issue--the F.T.C.A. does not permit the extension of state or local governmental immunity doctrines to the United States.

The United States is to be liable for torts "in the same manner and to the same extent as private individuals under like circumstances." 28 U.S.C. §2674; Rayonier, Inc. v. United States, 352 U.S. 315 (1957); Indian Towing Co. v. United States, 350 U.S. 61 (1955).

In addition to the plain provisions of 28 U.S.C. §2671 et seq., the jurisdictional enactment for the Federal Tort Claims Act, 28

U.S.C. §1346(b), gives the District Courts exclusive jurisdiction of all claims against the United States Government for losses "... caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occured."(emphasis added).

The language chosen by Congress in §2674 ["in the same manner and to the same extent as a private individual under like circumstances"] and §1346(b) ["under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occured"] should be given its ordinary meaning. This Court has repeatedly so held. United States v. Rodgers, 466 U.S. 475, 479 (La. 1984); Kosak v. United States,

465 U.S. 848 (1984); Richards v. United States, 369 U.S. 1,9 (1962)("[W]e must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used."); Hess v. United States, 361 U.S. 314 (1960); Rayonier, Inc. v. United States, 352 U.S. 314, 318 (1957); Indian Towing Co. v. United States, 350 U.S. 61 (1955).

Thus, it is necessary to determine how this plain meaning of the statute should be applied under the present circumstances. Initially it can be said that the language of the Act is not meant to exempt the government from liability in those situations where the activity of the government has no counterpart in the private sector.

> "...All government is inescapably "uniquely governmental" in that it is performed by the government... "Government is not partly public or partly private, depending upon the governmental pedigree of the type of the particular activity or the manner in which the government conducts it"...On the other hand,

> it is hard to think of any governmental activity on the "operational level," our present concern, which is "uniquely governmental," in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed."
>
> "There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation."

Indian Towing Co. v. United States, 350 U.S. at pp. 67-68. Accord, Berkovitz v. United States, ___ U.S. ___, 56 L.W. 4549, 4551 (1988).

As Justice Frankfurter explained in Indian Towing, supra, the purpose of the F.T.C.A. was to put the government on an equal footing with private citizens such that for actions in negligence, the United States government should be held accountable in the same manner and to the same extent as private citizens governed by the State in which the act or omission occured.

> "The broad and just purpose which the statute was designed to effect

> was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. Of course, when dealing with a statute subjecting the government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it."

Id. at pp. 68-69. (Emphasis added). Accord, United States v. Kubrick, 444 U.S. 111,118 (1979).

If one were to borrow the language of Justice Black from Rayonier, Inc. v. United States, supra, an analysis of the F.T.C.A. provisions

> "given their plain natural meaning, make the United States liable to ["CHALINE"] for the [postal service's] negligence in [designing, equipping, and supervising its postal facility] if, as alleged in the complaints, [Louisiana] law would impose liability on private persons or corporations under similar circumstances.
>
> * * *

> "We expressly decided in Indian Towing that the United States' liability is not restricted to the liability of a municipal corporation or other public body and that an injured party can not be deprived of his rights under the Act by resort to an alleged distinction, imported from the law of municipal corporations, between the government's negligence when it acts in a "proprietary" capacity and its negligence when it acts in a "uniquely governmental" capacity...
>
> It may be that it is "novel and unprecedented" to hold the United States accountable for the negligence of its fire fighters, but the very purpose of the Tort Claims Act was to waive the government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability...There is no justification for this Court to read exemptions into the Act beyond those provided by Congress."

Rayonier, Inc. v. United States, 352 U.S. at pp. 318, 319, 320 (emphasis added).

Thus, in considering the mandate of Congress, this Court has expressly stated that whether state political subdivisions enjoy immunity or privileges not otherwise

afforded private citizens is irrelevant to the issue of liability under the F.T.C.A.

> [T]he Government in effect reads the statute as imposing liability in the same manner as if it were a municipal corporation and not as if it were a private person...The fact of the matter is that the theory whereby municipalities are made amenable to liability is an endeavor, however awkward and contradictory, to escape from the basic historical doctrine of sovereign immunity. The Federal Tort Claims Act cuts the ground from under that doctrine; it is not self-defeating by covertly embedding the casuistries of municipal liability for torts."

Indian Towing Co. v. United States, 350 U.S. 61,65 (1955).

> "Just as we refused to import the "casuistries of municipal liability for torts" in Indian Towing, so we think it improper to limit suits by federal prisoners because of restrictive state rules of immunity."

United States v. Muniz, 374 U.S. 150,164 (1962). See also, United States v. Varig Airlines, 467 U.S. 797,813 n.10 (1984); Johns-Manville Sales Corp. v. United States, 622 F. Supp. 443, 445 (N.D. Cal. 1985)("In

other words, the court must apply the state law applicable as if the federal government were a private person acting in that state.") Id. at p. 445 n.4.

The law of the forum state, in its normal application or limitation, should be applied to F.T.C.A. claims to equate the United States with a private citizen. See, e.g., Scheib v. Florida Sanitarium and Benevolent Association, 759 F.2d 859 (11th Cir. 1985); Myrick v. United States, 723 F.2d 158 (4th Cir. 1983); Wright v. United States, 719 F.2d 1032 (9th Cir. 1983); Stewart v. United States, 716 F.2d 755 (10th Cir. 1982); Thomas v. Calavar Corp., 679 F.2d 416 (5th Cir. 1982); Richardson v. United States, 577 F.2d 133 (10th Cir. 1978).

Accordingly, whether Louisiana would exempt its governmental subdivisions from the Berry statutory employer test, see discussion at pp. 19-22 infra, is irrelevant--the F.T.C.A. forbids any such extension to the

federal government. An example can vividly illustrate this point.

Assume that Louisiana had not waived governmental tort immunity for its political subdivisions. In that case there could be no liability on the part of any state subdivision for any tort, and yet, the federal government in performing a similar function within Louisiana would enjoy no such immunity under the F.T.C.A. That is, the federal government's actions and potential liability would be analyzed from the perspective of a private person and not from the perspective of a Louisiana governmental entity.

Thus, if the United States could not assert immunity in the above example, how then can the Fifth Circuit Court of Appeals create an immunity where both Congress and this Court have seen fit to determine otherwise. Clearly, their decision is in error and should be reversed.

The United States should receive neither more favorable nor more detrimental treatment than would a private person or corporation in Louisiana. That is, under the facts of this case, one must assume that the U.S. Postal Service is a Louisiana corporation which had contracted the carriage of station-to-station mail under 13,000 independent contracts [including "CHALINE's"] for the last 20 years. Given those facts and this Court's pronouncement that the United States should not be treated as a municipality, the pivotal question becomes: Would the Louisiana Supreme Court grant immunity to XYZ Corporation [U. S. Postal Service] under this factual setting?

Although that answer requires a factual analysis which neither the district court nor the court of appeals considered (because of the automatic immunity rationale previously discussed), "CHALINE" asserts that under the

Berry analysis, the answer would be a resounding "No."

The panel's opinion was based upon two prior decisions of the Fifth Circuit. Leigh v. National Aeronautics and Space Administration, 860 F.2d 652 (5th Cir. 1988); Hebert v. United States, 860 F.2d 607 (5th Cir. 1986). Under the rules of the Fifth Circuit, one panel may not conflict with the holding of a prior panel. Umphlet v. Connick, 815 F.2d 1061,1063 (5th Cir. 1987); Washington v. Watkins, 655 F.2d 1346,1354 n.10 (5th Cir. 1981). The two earlier opinions ignored the language of the Act, and held that the statutory employer rules of Berry were inapplicable where the principal was a government entity.

As noted earlier, whether that holding is a correct interpretation of Louisiana law concerning Louisiana municipalities following Berry is irrelevant. With regard to the issue of statutory employer immunity,

Louisiana political subdivisions may or may not be entitled to more favorable treatment than private citizens; the federal government, on the other hand, may not. Therefore, absent further legislation, there is no basis for a federal governmental entity exception to the Louisiana Supreme Court opinion in Berry v. Holston Well Service, Inc., 488 So.2d 934 (La. 1986).

Two primary reasons support this statement- (1) The Louisiana Supreme Court did not create any such exception in Berry, and (2) the F.T.C.A requires that the United States be treated as a "private individual" and not as a governmental entity.

As succinctly stated in Berry, the Louisiana Supreme Court

> "has shifted its interpretive analysis regarding the statutory employer defense from one which favored a liberal application of the doctrine to one which is more restrictive...In so doing [they] have abandoned the "integral relation" test for a test that [they] feel is more in line with

> the purpose of sections 1032 and 1061...The reason for the change was that the former was being interpreted too expansively,...thus transforming a doctrine which was originally designed to provide secondary protection to an injured employee into one which grants immunity to principals regardless of whether they actually pay compensation...As a result, principals have been elevated to a more preferred position than an injured employee's immediate employer in that the quid pro quo existing between the employee and his immediate employer (i.e. compensation regardless of fault or tort immunity) does not exist between the employee and the principal..."

Berry v. Holston Well Service, Inc., 488 So.2d at p. 937. After discussing the obvious change in analysis from "necessary", "integral", and/or "essential" to the more restrictive analysis above, the Louisiana Supreme Court stated that in all future cases a new approach should be taken:

> "Although the shift is very clear, we have failed to succinctly set forth the method of analysis presently used by this Court in resolving the difficult question of statutory employment."
>
> "From a reading of Benson and its progeny the following general

rules or method of analysis can be gleaned. Basically, a determination of whether a statutory employment relation exists involves a three level analysis. In the first level, the primary focus is on the scope of the contract work....If it is determined that the contract work is specialized per se, as a matter of law the work is not a part of the principal's trade, business, or occupation, and the principal is not the statutory employer of the specialized contractor's employees."

* * *

"If it determined that the contract work is non-speciality, then the inquiry shifts to a comparison of the principal's trade, business or occupation and the contract work to see if the latter can be considered a part of the principal's trade, business or occupation."

* * *

"Lastly, the Court must determine if the principal is engaged in the work at the time of the alleged accident. La. R.S. 23:1032. At this level "[I]t is irrelevant that the principal has the financial resources or expertise to enter into a particular trade, business or occupation. In order for any person to come within the scope of the statute, he must be engaged in the enterprise at the time of the injury."

488 So.2d. at pp. 937, 938-39.

The history of the statutory employer defense, La. R.S. 23:1032 and La. R.S. 23:1061, to the federal government in F.T.C.A. cases can be traced in development through four Fifth Circuit decisions. Roelofs v. United States, 501 F.2d 87 (5th Cir. 1974); Thomas v. Calavar Corporation, 679 F.2d 416 (5th Cir. 1982); Hebert v. United States, 860 F.2d 607 (5th Cir. 1986); and Leigh v. National Aeronautics & Space Administration, 860 F.2d 652 (5th Cir. 1988). All except Leigh pre-dated the analysis shift in Berry. Under either the guidelines of Erie or the F.T.C.A., this Court is bound to follow, where available, the clear authority of the Louisiana Supreme Court. Such a pronouncement has clearly been established in Berry.

The Louisiana Supreme Court had earlier decided Klohn v. Louisiana Power & Light, 406 So.2d 577 (La. 1981), holding that the City of Thibodaux [a municipality] should be

considered the plaintiff's statutory employer because the work performed was "necessary" and "essential" to the City's purpose. At that time, statutory employment in general was governed by the "necessary" and "essential" guidelines rather than the more restrictive guidelines set by the Berry court.

Relying primarily upon Klohn, the Fifth Circuit in Thomas v. Calavar Corporation, 679 F.2d 416 (5th Cir. 1982), determined that a contractor's employee injured during performance of the Strategic Petroleum Reserve Project was a statutory employee of the United States. Judge Rubin, speaking for the Fifth Circuit, however, noted that despite Klohn, the F.T.C.A. did not mandate an automatic finding of immunity.

> "The United States does not contend that it would be a principal or statutory employer under the Louisiana Workmen's Compensation Law whenever a federal agency is authorized to contract for a particular work, and we do not suggest that result...Rather, as with employers generally its status

> as a statutory employer must be determined on the facts of each case."

679 F.2d at p. 420.

Yet, despite this language, the instant panel in blindly following Hebert and Leigh has now applied automatic statutory employer immunity under the guise that any association with government is "necessary" and "essential" to the government's purpose. As the Supreme Court in Indian Towing noted, "All government is inescapably 'uniquely governmental'". Were it not a part of the government's function, the particular activity would not be performed in the first instance.

The guidelines from the Louisiana Supreme Court in Berry could not be more precise-the three level analysis of Berry is to be applied in all instances of statutory employment. There was no exception created for governmental entities, either Louisiana or federal. Further, even were an exception created for Louisiana governmental entities,

this Court has held that in F.T.C.A. actions, the United States is not to be treated as a governmental entity or municipality, but is to be treated as a private individual under like circumstances. Indian Towing Co. v. United States, 350 U.S. 61 (1955); Rayonier, Inc. v. United States, 352 U.S. 315 (1957).

The F.T.C.A. must be "given a broad interpretation to effectuate the legislative aim of putting citizens and national sovereign in tort claim suits on a footing of equality as between private parties within that state." Roelofs v. United States, 501 F.2d 87,92 (5th Cir. 1974).

The Louisiana Supreme Court has clearly stated that in those situations where a private individual or corporation does not perform the entirety of its own work, but rather customarily contracts with another for the performance of same because it lacks expertise, manpower, resources, or equipment, the work performed under the contract is not

a part of the principal's trade, business or occupation. Hence, the principal may not escape tort liability to an employee of the contractor under the guise of statutory employment.

Clearly, as admitted by the government's own witnesses, and as noted by the district judge, the work performed by "CHALINE" under the contracts in question was beyond the scope of the trade, business or occupation of the U.S. Postal Service. No exception to the established legislative and judicial process should be made in this instance.

> "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it."

United States v. Muniz, 374 U.S. 150,166 (1962), citing, Rayonier, Inc. v. United States, 352 U.S. 315,320 (1957).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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APPENDIX A

Sheree K. CHALINE,
Plaintiff-Appellant,

UNITED STATES OF America,
Defendant-Appellee.

No. 89-4198
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Aug. 18, 1989.

Injured employee of private contractor brought Federal Tort Claims Act suit against post office to recover for injury suffered while delivering mail. The United States District Court for the Western District of Louisiana, Donald E. Walter, J., dismissed the suit, and appeal was taken. The Court of Appeals held that, under Louisiana law, United States Postal Service was statutory employer of private contractor delivering mail, such that sole remedy of contractor's injured employee was under worker's compensation statute.

Affirmed.

1. Worker's Compensation 220,2084

Under Louisiana law, United states Postal Service was statutory employer of private contractor delivering mail, such that sole remedy of contractor's injured employee was was under worker's compensation statute. 28 S.S.C.A. 1346; LSA-R.S. 23:1032,28:1061

2. Workers' Compensation 297

Under Louisiana law, injured worker was employee limited to remedy of workers' compensation, even if he was officer of employer corporation, absent evidence of her written election to be exempt from workers' compensation coverage. LSA-R.S. 23:1035.

Appeal from the United States District Court for the Western District of Louisiana (CV 87-2725 "M").

Before GEE, WILLIAMS and DUHE, Circuit Judges.

PER CURIAM:

Sheree Chaline appeals the dismissal of her Federal Tort Claims Act suit. We affirm.

I.

On June 19, 1986, appellant Sheree Chaline severed her achilles tendon on a swing door at the loading dock of the United States post office in Deridder, Louisiana. At the time of the accident, Ms. Chaline was delivering mail from the post office in Lake Charles, Louisiana to the facility in Deridder, pursuant to a contract between Holley Mail Service and the United States Postal Service.

Approximately two weeks before the accident, John Holley, the president and sole shareholder of Holley Mail Service, had requested novation of his contract with the United States Postal Service. Holley stated that he had made a business judgment to incorporate, and requested that Delta Mail Service, Inc. succeed Holley Mail Service as the contractor for the route. Holley's novation request did not reveal to the Postal Service that in April, 1986, he had entered

into an agreement to sell the stock of Delta Mail Service to Sheree Chaline's husband, Joseph Chaline. Holley's contract with the Postal Service stated that he could not assign or transfer his rights under the contract without prior approval of the Postal Service.

Sheree Chaline and her husband began operating the route pursuant to the Agreement to Sell on April 13, 1986. Under the Agreement, the stock of Delta Mail Service would not be transferred to the Chalines until the Postal Service accepted the proposed novation of Holley's contract. Still without official notification of the proposed transfer, the Postal service accepted the novation effective August 2, 1986, two months after Ms. Chaline's injury. Sherre Chaline nevertheless contends that at the time of her accident she was delivering the mail as an officer and director of Delta Mail Service,

which was the "de fact" contractor with the United States Postal Service.

II.

[1] The Federal Tort Claims Act permits recover in tort against the United States only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Under Louisiana law, the principal for whom a contractor is performing work is not liable for negligent injuries suffered by the contractor's employees if the work contracted out is part of the principal's "trade, business, or occupation." In these circumstances, the principal is deemed to be the "statutory employer" of the injured employee, whose sole remedy is under Louisiana's workers' compensation law. LA.Rev.Stat.Ann. §§ 23:1032, 23:1061 (West 1985). The district court determined that the United States

Postal Service was Ms. Chaline's statutory employer under this doctrine, thus precluding her tort claim.

Ms. Chaline contends that the station-to-station delivery for the United States Postal Service, in which she was engaged at the time of her injury, is routinely contracted out to private services. She argues that under the Louisiana Supreme Court Court decision in Berry v. Holston Well Service, Inc., 488So.2d 934 (La.1986), this activity is not part of the Postal Service's "trade, business, or occupation." The Berry court stated that a principal must be engaged in the work at the time of the accident to meet the test for a statutory employer. Id. at 938.

The district court correctly held, however, that the more stringent definition of a statutory employer set out in Berry v. Holston Well Service does not apply when a governmental entity is the employer. This

Court has determined that the Berry case "does not modify the rule of Klohn v. Louisiana Power & Light, 406 So.2d 577 (La.1981), or Thomas V. Calavar Corp., 679 F.2d 416 (5th Cir.1982), which analyzed the statutory employer status of government entities." Hebert v. United States, 860 F.2d 607, 608 (5th Cir.1986). See also Leigh v. National Aeronautics and Space Admin., 860 F.2d 652, 653 (5th Cir.1988). These prior decisions of the Court settle the issue. We will not consider Ms. Chaline's argument that Berry should apply to this case. Umphlet v. Connick, 815 F.2d 1061,1063 (5th Cir.1987; Washington v. Watkins, 655 F.2d 1346, 1354 n. 10 (5th Cir.1981), cert. denied, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982). Under the test for statutory employer that applies to governmental entities, we must conclude, as did the district court, that the delivery of mail between post offices is part of the "trade, business, or occupation" of

the United States Postal Service. See 39 U.S.C. § 101 (statute stating purpose and function of United states Postal Service); Leigh v. NASA, 860 F.2d at 653 (NASA was statutory employer of technician assigned to work on externaL tank of space shuttle).

[2] Ms. Chaline also argues that the district court erred in concluding that her sole remedy is under Louisiana's worker's compensation statute. She contends that at the time of her injury, she was not an employee as defined under Louisiana's workers' compensation law because she was delivering mail as an officer and director of Delta Mail Service. The district court rejected this argument, noting that even if Ms. Chaline could be considered an officer of Delta Mail Service, he had not introduced evidence of her written election to be exempt from workers' compensation coverage, as required by La.Rev.Stat.Ann. § 23:1035. This provision states that the workers'

compensation scheme shall apply to all persons injured in conjunction with their work absent such an election. The district court correctly applied this mandatory provision.

In addition, at the time of Ms. Chaline's injury, the Postal Service had not yet approved the novation of the Holley contract, and the stock of Delta Mail Service had not been transferred to the Chalines. Even assuming that the Holley contract could be transferred to the Chalines without the Postal Service's consent, such a transfer under the terms of the Agreement to Sell had not occurred at the time of Ms. Chaline's injury. These facts fully support the district court's determination that Ms. Chaline was an employee under Louisiana's workers' compensation statue at the time of her injury.

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-4198

SHEREE K. CHALINE,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

Opinion August 18, 5 Cir., 1989, ___F.2d___)

(September 20, 1980)

Before GEE, WILLIAMS and DUHE, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate

Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

****

SHEREE K. CHALINE *

*

VERSUS * NO. 8702725

*

UNITED STATES OF AMERICA *

****

ORAL REASONS FOR JUDGMENT

THE COURT: This is an action for damages for personal injuries under the Federal Torts Claims Act. The plaintiff, MS. CHALINE, was injured when a steel bumper on a set of double swinging doors on the loading dock of the Post Office in Deridder swung and caught the back of her left ankle and severed the achilles tendon. At the time of the accident she was hauling mail station-to-station from the Post office in Lake Charles to, I believe to Deridder at the time, is that right? To Deridder. She contends that the injury resulted from the

negligence of the U.S. Postal Service. She may well have a good claim on that, just from what I see. But the U.S. contends that the Post Office is immune from suit because of the statutory employer pursuant to Louisiana revised statute 1032 and 1061. Or to the issued of negligence and immunity bifurcated. I am now going to rule on the issue of the Government's immunity from suit in favor of the government and against the plaintiff for the following reasons. The Federal Torts Claims Act provides that the Federal Government is liable to the extent a private person would be liable under Louisiana law. 28 USC 1346(A), United States versus Orleans, 425 US 807 1976. Louisiana law provides that any person who contracts out work which is part of his trade, business or occupation is liable to any employee of the contractor engaged insuch enterprise for worker's compensation to the same extent as if the contractor's employees were one of its own

employees. This is the exclusive remedy against that person. If the plaintiff is an employee of such a contractor who was doing work that is part of the trade, business or occupation of the United States, and more specifically the Postal Service, then the U.S. is entitled to the same immunity from suit and tort as enjoyed by employers generally. The plaintiff contends that the station-to-station delivery in which the plaintiff was engaged is not part of the U.S. Postal services' trade, business or occupation. Under an interpretation of Louisiana law made by the Louisiana Supreme Court in Berry versus Holston Well Service, Inc., 488 So.2d 934. Under that case an employer who does not perform the work contracted out itself, but only relies on independent contractors, does not become a statutory employer under the meaning of the applicable statutes. As I said, I think that if we could stop there Berry would apply and

counsel would have awfully good argument. But whatever the application the Berry case may have to a private employer, the Fifth Circuit in Hebert versus United States 860 Fd.2d 607 out of the Fifth Circuit in 1986, has foreclosed its applicability as I read the case as to government entities. In that case the Fifth Circuit held that the applicable test if found not in Berry, but in Thomas versus Calivar 679 Rd.2d 416. Under the test enunciated in Thomas, and subsequent cases, the fact that the United States elects to perform the work required by its mission under federal law through contractors and subcontractors rather than its own employees is not dispositive. For the statutory employer test does not turn on whether the statutory employer utilizes its own employees to perform similar work. If this work is part of the postal services' usual and customary business then employees of contractors hired to perform part of that mission

must seek their remedy under the Louisiana worker's compensation law exclusively. To determine whether a statutory employment relationship exists, the Court focuses not on the specific duties of the employee, but rather on the relationship between the United States as the principal and the independent contractor. The basic function of the Postal Service is set forth in 39 USC 101, which I need not quote in full. Suffice to say that the Postal Service has the basic function and the obligation to provide postal services. It's clear that the United States Postal Service is mandated to provide service through rural communities, and the fact that it chooses to do so through a star route contractors rather than its own employees does not lessen the relationship between these services and the basic mission of the Postal Service. Therefore, the Court finds that a statutory employment relationship exists in this case. Plaintiff further

contends, however, that she was not an employee of the company as employee is defined in the Louisiana worker's compensation law. Rather she contends that she was an officer of the independent contractor and had waived coverage under the Louisiana worker's compensation law, and therefore is entitled to bring this action. Under Louisiana revised statutes 23:1044, every executive officer of a corporation is deemed to be an employee of the corporation unless the officer has by written consent pursuant to revised statues 23:1035 elected not to be covered by the worker's compensation statute. Even if I assume that the plaintiff was an officer of the corporation, she has not escaped the presumption that he is an employee because she has produced no evidence of a contemporaneous written consent by her of her election not to be covered by the statute. I, therefore, find that the plaintiff has not met the exception to 1035, and that under

mandatory language of that section the provisions of the worker's compensation act apply. Accordingly, I hold that the United States is entitled to status of statutory employer, that the plaintiff's federal tort claims suit against the United States is barred. The fact that the United States is not required to pay into the Louisiana Worker's Compensation Fund is not a bar to the Government's use of these statutes as protection against the suit. Federal Tort Claims act which authorizes the Government to use the protection of state law must be given broad interpretation in order to effectuate the legislative aim of putting citizen and national sovereign on a footing of equality as between parties within that state, citing Roelofs versus U.S. Fd.2d 87. The plaintiff's argument that the worker's compensation payments are unavailable to her are therefore unavailing. And this Court notes the protection given to such a person under

Louisiana law in revised statutes 23:1061, but does not decide whether such a remedy is available as against as against the United States. the question is for another day when a person makes such a claim against the United States. Plaintiff's action is therefore dismissed, and a judgment approved as to form in accordance with this opinion will be signed upon presentation. Okay, thank you all gentlemen. Court is in recess.

Supreme Court, U.S.
FILED
JAN 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-815 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

SHEREE K. CHALINE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the United States was a "statutory employer" under Louisiana's workers' compensation law, applicable to the United States under the Federal Tort Claims Act, and was thus not liable in tort to petitioner for injuries she sustained while delivering bulk mail between post offices under a contract between the Postal Service and petitioner's immediate employer.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-815

SHEREE K. CHALINE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A10) is reported at 887 F.2d 505. The oral opinion of the district court (Pet. App. C15-C2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered August 18, 1989. An order treating petitioner's suggestion for rehearing en banc as a petition for rehearing and denying it was entered September 20, 1989 (Pet. App. B12-B13). The petition for a writ of certiorari was filed November 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, the employee of a contractor for the United States Postal Service, severed her achilles tendon on a door at the loading dock of the United States post office in Deridder, Louisiana. At the time, petitioner was delivering bulk mail from the post office in Lake Charles, Louisiana, pursuant to a contract between Holley Mail Service and the Postal Service (Pet. App. A4). Petitioner brought suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2674, alleging that her injury was caused by the negligence of the Postal Service.

The district court dismissed petitioner's action, holding that under Louisiana law, the United States was not liable in tort because petitioner's exclusive remedy arose under the applicable workers' compensation statute. The court reasoned that the workers' compensation exclusion applied to this case, because the United States was petitioner's "statutory employer." Pet. App. C15-C19.

2. The court of appeals affirmed. Pet. App. A2-A10. The court began by observing that the FTCA "permits recovery in tort against the United States only 'under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission ocurred.' " *Id.* at A6 (quoting 28 U.S.C. 1346(b)). Under Louisiana law, the court noted, a principal is not liable in tort to the employees of a contractor performing work for the principal "if the work contracted out is part of the principal's 'trade, business, or occupation.' " Pet. App. A6 (citing La. Rev. Stat. §§ 23:1032, 23:1061 (West 1985)). In that situation, the court explained, "the principal is deemed to be the 'statutory employer' of the injured employee, whose sole remedy is under Louisiana's workers' compensation law." *Ibid.*

Applying those principles, the court concluded that the United States was petitioner's "statutory employer." The court relied on standards set forth in prior Fifth Circuit cases for analyzing whether a government entity is a statutory employer. Pet. App. A7-A8 (citing *Herbert* v. *United States*, 860 F.2d 607, 608 (1986) (per curiam); *Leigh* v. *NASA*, 860 F.2d 652, 653 (1988)). The court rejected petitioner's contention that the "more stringent definition of a statutory employer" announced in *Berry* v. *Holston Well Service, Inc.*, 488 So.2d 934 (La. 1986), should govern here. The court reasoned that *Berry* "does not apply when a governmental entity is the employer." Pet. App. A7.

ARGUMENT

Petitioner challenges the court of appeals' holding that Louisiana's "statutory employer" doctrine bars her FTCA claims. The issue of state law that underlies that holding presents no question of national importance and does not warrant review by this Court. In any event, even if the legal standards endorsed by petitioner were applied to her claim, petitioner would not prevail on the particular facts of this case. Finally, the state statute at issue has been amended so as to render the question presented of no continuing significance.[1]

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[1] We also note that the petition may be jurisdictionally out of time under 28 U.S.C. 2101(c). The judgment of the court of appeals was entered August 18, 1989 (Pet. App. A2); the petition for certiorari was filed November 17, 1989, ninety-one days after entry of the judgment. Although a timely petition for rehearing would have tolled the time for filing a petition for a writ of certiorari (see Sup. Ct. R. 20.4 (1980)), petitioner did not file a petition for rehearing; instead, she filed a suggestion for rehearing en banc, which the panel treated as a petition for rehearing in accordance with local Internal Operating Rule 35 (and denied). Consequently, the time for seeking certiorari

a. Under the Federal Tort Claims Act, the United States is liable for torts only if a private individual would be liable under like circumstances, in accordance with the law of the place where the alleged negligent act occurred. 28 U.S.C. 1346(b), 2674; *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64-65 (1955). There is no dispute that Louisiana law governs petitioner's claim. Under Louisiana law, the principal for whom a contractor is performing work is not liable for injuries suffered by the contractor's employees if the work contracted out is part of the principal's "trade, business, or occupation." Rather, in such circumstances the principal is deemed to be the "statutory employer" of the injured employee, and the employee's sole remedy is under Louisiana's workers' compensation law. La. Rev. Stat. § 23:1032 (West 1985). Since the Postal Service here contracted out work that was undeniably part of its "trade, business, or occupation," namely, delivering mail, it was a principal under Louisiana law, and, therefore, was petitioner's statutory employer. Hence, petitioner's tort claim was precluded under Louisiana law.

Petitioner contends (Pet. 6-17) that the court of appeals applied an incorrect legal test in determining whether the Postal Service was petitioner's "statutory employer." In petitioner's view, instead of applying the more rigorous standards for private entities announced in *Berry* v. *Holston Well Service, Inc.*, 488 So.2d 934 (La. 1986), the court below erroneously relied on standards that govern the inquiry when a governmental entity has contracted out work.

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may have expired before petitioner filed the instant petition. Cf. *Missouri* v. *Jenkins*, No. 88-1150 (argued Oct. 30, 1989); Sup. Ct. R. 13.4 (1990) ("A suggestion made to a United States court of appeals for rehearing in banc pursuant to Rule 35(b) * * * is not a petition for rehearing within the meaning of this Rule.").

Whatever the merits of that claim, it does not warrant the attention of this Court. To begin with, the determination of the appropriate rule of law in this case depends primarily on the proper interpretation of Louisiana state law, an area with which the court of appeals has greater familiarity than this Court. In *Thomas* v. *Calavar Corp.*, 679 F.2d 416, 420 (1982), the Fifth Circuit, after an extensive examination of Louisiana precedents, articulated standards for applying the Louisiana "statutory employer" doctrine under the FTCA. Although the Louisiana Supreme Court in *Berry* subsequently modified the standard for determining whether a defendant is a "statutory employer," that case involved a private employer, and the Fifth Circuit has concluded that the analysis set forth in *Thomas* continues to govern the "statutory employer" issue in cases brought under the FTCA. *Herbert* v. *United States*, 860 F.2d at 608 ("*Berry* * * * does not modify the rule of *Klohn* v. *Louisiana Power & Light*, 406 So. 2d 577 (La. 1981), or *Thomas* * * *, which analyze the statutory employer status of governmental entities."); *Leigh* v. *NASA*, 860 F.2d at 653 (same).

The question whether the Fifth Circuit has correctly interpreted the impact of *Berry* on Louisiana law, as applied to the United States through the FTCA, does not merit further review by this Court. See *Bowen* v. *Massachusetts*, 108 S. Ct. 2722, 2739 (1988) ("We have a settled and firm policy of deferring to the regional courts of appeals in matters that involve the construction of state law."); *Frisby* v. *Schultz*, 108 S. Ct. 2495, 2500 (1988) ("Following our normal practice, 'we defer to the construction of a state statute given it by the lower federal courts . . . to reflect our belief that district courts and courts of appeal are better schooled in and more able to interpret the laws of their respective States.' ") *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 395 (1988) ("This Court

rarely reviews a construction of state law agreed upon by the two lower federal courts."); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985).[2]

b. Even if petitioner were correct that the standards of *Berry* are controlling, the Postal Service would still be deemed to be petitioner's statutory employer.[3] Under

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[2] Petitioner argues that the court's holding conflicts with the FTCA's requirement that the liability of the United States be determined under state law as if it were a private person, stating (Pet. 15) that the United States must in all respects be equated to a private citizen under the FTCA. We note that some FTCA cases have considered state rules of law that have particular application to governmental tort defendants. See, *e.g.*, *Louie* v. *United States*, 776 F.2d 819, 825 (9th Cir. 1985) ("a determination of the government's [FTCA] liability under Washington law [for actions involving a law enforcement function] rests properly on an examination of the liability of the state or a municipality under like circumstances"); *Doggett* v. *United States*, 858 F.2d 555, 561 (9th Cir. 1988) (where "unique governmental functions" are involved, court seeks "to determine what liability state law attaches to * * * analogous entities subject to its jurisdiction"). Other cases have declined to look to rules of liability for state entities or their political subdivisions rather than private employers. See *Raymer* v. *United States*, 660 F.2d 1136, 1140-1142 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982); *Ewell* v. *United States*, 776 F.2d 246, 248-249 (10th Cir. 1985). Compare *United States* v. *Muniz*, 374 U.S. 150, 164 (1963) (state immunities for prison officials inappliable to suits by prisoners against the United States under the FTCA); *Indian Towing Co.* v. *United States*, 350 U.S. 61, 65 (1955). However, whether or not this issue might merit consideration in some other case, it is not squarely presented here. As we show below (at 6-7), petitioner's claim does not satisfy either of the standards drawn from state law.

[3] Because the government prevailed below, the judgment may be defended "on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977). In the court below, the government urged that the United States would qualify as a statutory

Berry, an employer hiring an independent contractor is considered a "statutory employer" if (1) the contract work is routine and customary and does not require a specialized degree of skill, training, and experience; (2) the work is part of the employer's own trade or business and the employer is capable of performing it; and (3) the employer is engaged in the enterprise at the time of the accident. 488 So.2d at 938-939. Each aspect of that test is satisfied in this case.

First, the delivery of mail, especially bulk, consists only of driving a truck and loading and unloading packages. It is routine and customary, and does not require specialized skill. Second, the delivery of mail is the Postal Service's business, 39 U.S.C. 101, and it is obviously capable of performing it. The Postal Service has approximately 875,000 employees dedicated to delivering mail, and so the work is hardly unique to contractors. Finally, the Postal Service was engaged in its mail delivery enterprise at the time of the accident, as it has been for many years. Gov't C.A. Br. 13-14, 25-28. Consequently, the application of the *Berry* test, as petitioner urges, is of no assistance to her.

c. At all events, the question whether *Berry* should apply to petitioner's claim is purely of historical interest. The provision that defines the liability of a principal to employees of a contractor, La. Rev. Stat. § 23:1061 (West 1989), was recently amended. See Act No. 454, § 3, 1989 La. Sess. Law Serv. 1114 (West) (effective Jan. 1, 1990). The amended statute now states:

> The fact that work is specialized or nonspecialized, is extraordinary construction or simple maintenance, is work that is usually done by contract or by the prin-

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employer under the *Berry* test. See Gov't C.A. Br. 13-14, 19, 25-28. Thus, the government may rely on that ground in defending the judgment here.

> cipal's direct employee, or is routine and unpredictable, shall not prevent the work undertaken by the principal from being considered part of the principal's trade, business, or occupation, regardless of whether the principal has the equipment or manpower capable of performing the work.

La. Rev. Stat. § 23:1061 (West 1989). This language effectively overrules the three-factor analysis set forth in *Berry*. Thus, the issue raised by petitioner is of no continuing importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1990

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